STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Cooper, P.J., and Fort Hood and Borrello, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RANDY R. SMITH,

Defendant-Appellee.
_____/

Supreme Court No. 130245

Court of Appeals No. 256066

Lower Court No. 03-193910-FC

OAKLAND COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff-Appellant

ROBIN M. LERG (P 40297)
Attorney for Defendant-Appellee

130245

DEFENDANT'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

FILED

JAN 17 2006

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

ROBIN M. LERG (P 40297)
Attorney for Defendant-Appellee
3001 W. Big Beaver, Ste. 324
Troy, MI 48084
(248) 649-4777

TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED.....ii

STATEMENT OF QUESTIONS PRESENTED.....iv

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS.....1

ARGUMENT.....13

1. The Court of Appeals was correct in finding that the trial court should have instructed the jury regarding the more specific and more appropriate charge of involuntary manslaughter under MCL 750.329.....13

Standard of Review & Issue Preservation.....13
Discussion.....13

A. The Court of Appeals correctly held that the trial court should have instructed the jury on involuntary manslaughter under MCL 750.329 because it was a necessarily included offense under the unique facts of this case where the prosecution charged defendant with committing second degree murder using a gun.....14

B. The Court of Appeals correctly held that the trial court should have instructed the jury on involuntary manslaughter under MCL 750.329 because it is a necessarily included offense of common law manslaughter, which itself is a necessarily included offense of murder.....18

C. The Court of Appeals correctly held that the trial court should have instructed the jury on involuntary manslaughter under MCL 750.329 because it was consistent with the defense theory that he was guilty of only this offense.....21

D. Failure to instruct the jury on involuntary manslaughter under MCL 750.329 was not harmless error.....22

SUMMARY AND RELIEF.....15

APPENDIX.....26

INDEX OF AUTHORITIES

Cases

Beck v Alabama, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980) 23
Bennett v Scroggy, 793 F2d 772 (CA 6, 1986) 23
Berrier v Egeler, 583 F2d 515 (CA 6, 1978), cert den 439 US 955; 99 S Ct 354; 58 L Ed 2d 347 (1978) 21
Ferrazza v Mintzes, 735 F2d 967 (CA 6, 1984) 23
Harville v State Plumbing & Heating, Inc, 218 Mich App 302, 323-324 (1996) 18
Hopper v Evans, 456 US 605; 102 S Ct 2049; 72 L Ed 2d 367 (1982) 23
People v Adams, 416 Mich 53, 58 (1982) 13
People v Beach, 428 Mich 450 (1988) 13, 23, 24
People v Cornell, 466 Mich 335, 353-354 (2002) 15
People v Duggan, 115 Mich App 269, 272; 320 NW2d 241 (1982) 19
People v Hawthorne, 265 Mich App 47, 50 (2005) 13
People v Heflin, 434 Mich 482, 504 (1990) 19
People v Holtschlag, 471 Mich 1 (2004) 16, 18
People v Liggett, 378 Mich 706, 714; 148 NW2d 784 (1967) 21
People v Maghzal, 170 Mich App 340, 345; 427 NW2d 552 (1988) 19
People v Mendoza, 468 Mich 527 (2003) ..... passim
People v Pepper, 389 Mich 317, 322; 206 NW2d 439 (1973) 21
People v Reed, 393 Mich 342, 349-350 (1975) 21
People v Richardson, 409 Mich 126 (1980) 13
People v Ross, 73 Mich App 588 (1977) 24
People v Silver, 466 Mich 386, 393, fn. 7 (2002) 23
People v Stanley Jones, 69 Mich App 459, 461 (1976) 22
People v Vaughn, 447 Mich 217 (1994) 13
People v. Doss, 78 Mich. App. 541 (1978) 2
Washington v Texas, 388 US 14, 19, 87 S Ct 1920, 18 L Ed 2d 1019 (1967) 13

Statutes

MCL 750.317 ..... 1, 15
MCL 750.321 ..... passim
MCL 750.329 ..... passim
MCL 768.29 13

Other Authorities

CJI 2nd 16.11 9

Treatises

22 Michigan Law and Practice, Trial, §236, p 386 21
Perkins & Boyce, Criminal Law (3d Ed) p. 105 18

Constitutional Provisions

US Const, Am V 13, 23
US Const, Am XIV 13, 21, 23

STATEMENT OF QUESTION PRESENTED

1. Was the Court of Appeals correct in finding that the trial court should have instructed the jury regarding the more specific and more appropriate charge of involuntary manslaughter under MCL 750.329?

Court of Appeals said "Yes."

Plaintiff-Appellant says "No."

Defendant-Appellee says "Yes."

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

Defendant-Appellee Randy R. Smith (defendant) was originally charged in the alternative with one count of second degree murder, MCL 750.317, or manslaughter, MCL 750.321, and felony firearm, MCL 750.227b in the shooting death of Ashleigh Moomaw (*Complaint,* lower court file). Following the preliminary examination, the prosecution was successful in adding a second alternative count of manslaughter committed by aiming or pointing a firearm intentionally but without malice, MCL 750.329 (PE 3-4, 65-67, 69). Following a two-day jury trial before Oakland County Circuit Court Judge Edward Sosnick, defendant was convicted of second degree murder and felony firearm. On May 5, 2004, defendant was sentenced to consecutive terms of 31 to 50 years and two years respectively.

Amended alternative manslaughter charge under MCL 750.329

Before the preliminary examination, the prosecution announced that after proofs, it was going to move to bind defendant over on an additional, alternative count of manslaughter under the theory of "death by weapon aimed with intent, but without malicious (sic)," (PE 3-4) because:

> Basically, it's another form of manslaughter that's not contained in the statutory short form. And the statute for that, Your Honor, is MCL 750.329 (PE 4).

During the preliminary examination, the prosecution specifically elicited from Jamie Crawford that defendant intentionally aimed the gun in the decedent's direction, then successfully moved, following proofs, to add the second alternative count of involuntary manslaughter under MCL 750.329, acknowledging that "it's a question of fact truly as to

what the defendant's state of mind is and was at the time of the incident. That's the real question here." (PE 51, 65-67).

On March 31, 2004, the prosecution filed a motion "For Leave of Court to Dismiss Alternative Charge," because "it is inapplicable to the facts of the case and inconsistent with the prosecution's theory of what occurred:"

> 'The statute was designed to punish the careless use of firearms when no mischief was designed. The absence of malice is as necessary an ingredient in the statutory definition as is the use of firearms.' *People v. Doss,* 78 Mich. App. 541 (1978). It is the People's position however, that the Defendant killed Ashleigh Moomaw with malice, or at the very least acted mischievously. As such, MCL 750.329 is inapplicable to the present the case (sic). (26e).

At the March 31, 2004 motion hearing, defendant asked the court to consider expanding *People v Mendoza,* 468 Mich 527 (2003) "to indicate that once the Prosecution has charged a count of that nature,[1] that because it could be given as a jury instruction, if I can show the facts, that it should at least remain there through the presentation of the facts of the case." (3-31-04 3-4). After the trial court granted the motion to dismiss the alternative count under MCL 750.329, this exchange occurred:

> ...what opened is obviously after the proofs are submitted, whether or not that will be given as necessarily included offense (sic) if the facts so support it.
>
> MR. WIGOD [prosecutor]: I agree.
>
> THE COURT: Yeah. So –
>
> MR. WIGOD: If the Court determines that it –
>
> THE COURT: It would never go to the jury – it's an alternative – the only purpose of that charge, originally, was because of the case, you know, to protect the People. Okay. So the bottom line is, I grant the motion to dismiss. *At the close of the proofs, we talk about, you know, what will be offered as lesser included, I'll reconsider it at that time, or I will seriously consider it at that time.*
>
> MR. WIGOD: *Okay* (3-31-04 4-5, emphasis added).

[1] The defense argued, and the trial court agreed, that the offense was a necessarily included offense under *Mendoza* (3-31-04 3).

Trial & Sentencing

The charges stemmed from the shooting death of 16-year-old Moomaw on December 7, 2003. Relying on the discussion between the trial court and the prosecutor following the dismissal of the alternative count of manslaughter under MCL 750.329 on March 31, 2004, the defense told the jury in its opening statement that its theory was that defendant was guilty of the dismissed alternative charge:

> ...Let me be real clear about one thing. Randy Smith is guilty. He's guilty of having that weapon in his hand. He's guilty of having that weapon fire from his hand and the result of that was that Ashley (sic) Moomaw died. I am not going to stand here and try and say to you not guilty, let's forget all those facts. That would be – on may part because the facts show that he killed her (sic). *I'm only asking that you look at the law and you look at what the law has given you as options. And that the option you select is one that fits the facts, not the highest possible charge. You will be getting an instruction from the law that is manslaughter, intentionally aiming a weapon without malice and without the specific intent to kill. That you will see and we will argue more in closing argument and you'll see from the facts how that charge plays into what prosecution has to prove on second degree and first degree. – second degree and manslaughter* (sic). But you see, there is one critical difference. And in second degree, as the prosecution has read you, for him to prove his case beyond a reasonable doubt, tht he has to show the Defendant had one of these three stages of mind: he intended to kill, he intended to do great bodily harm, or he knowingly created a very high risk of death or great bodily harm knowing that the death or great bodily harm would be the likely result of his actions. Involuntary manslaughter charge is a little bit different. It has all the same elements as we talked about the two. At the end of the trial, you will be able to have a set so you can read them because listening to us talk about them is very different before all the evidence you're going to be hearing on all the information, but the key difference here is that the Defendant intended to point the firearm – in the manslaughter charge – without lawful excuse or justification. The charge itself reads without malice. Malice being desire to inflict injury or harm or suffering on another because of hostile – deep seated meanness.
>
> There is on denial (sic) that the death occurred – gun was in his hand and he fired. *And that's the single point difference between the prosecution is going to interpret those facts and how I'll be interpreting those facts and presenting proof* – (someone coughing) *Randy Smith* (4-12-04 17-18, emphasis added).
>
> ...

> ...When we finish the trial, when we come back after closing statements, I'm going to ask you now, as I'm going to ask you then, find him not guilty of second degree murder – guilty of intentionally aiming that weapon without that malice, the guilt make him for that but do it for the correct charge (4-12-04 22-23).

Testimony elicited showed that police found a locked door and covered windows when they arrived at 135 W. Madge in Hazel Park, and after forcing their way in, found a younger white woman lying motionless on her left side in a fetal position on the living room floor in a pool of blood with a possible bullet wound over her right eye (4-12-04 33-41). Emergency medical services workers pronounced her dead at the house (4-12-04 54). It was later determined that she died of a gunshot wound that would not have caused instantaneous death from a small caliber bullet that had not been fired a close range caused by a homicide (4-13-04 11-18). Toxicology tests showed that she had consumed a small amount of alcohol (4-13-04 15).

When Darrin Teed went to defendant's house to purchase ecstasy from "Blain Bravin"[2] at about 1:00 a.m. on December 7, 2003, "Bravin" opened a kitchen drawer, pulled out a gun Teed later identified as a Browning .22 long rifle, and showed it to him. Moomaw and Crawford arrived at the house around the same time. While calls were being made to get the ecstacy, defendant, sitting in the middle of the living room couch, pulled a gun, identified as a .25 caliber semiautomatic, out of his waistband, and showed it to Teed, and told him that the gun held six rounds in the clip and one in the chamber after Teed asked about the gun. Defendant took out the magazine and showed it to Teed. Teed did not see the gun again after defendant put the magazine back into the gun. Jeremy Johnson, who had been trying to secure the ecstacy, announced that he could get some ecstasy pills at a party "on Caldonia," so Teed,

[2] It is believed that Teed was referring to Blaine Braybant.

"Bravin" and Johnson left, borrowing Moomaw's car, while defendant, Moomaw and Crawford remained behind (4-12-04 109-119, 121).

Crawford testified that the original plan had been to "hang out" with "Britney Crawford (Britney)" and "Jennifer Edgle (Edgle)." When shd got off of work at around 10:00 p.m., Moomaw picked Crawford up and headed to defendant's house so that Moomaw could retrieve her shoes. They noticed that a car belonging to Christina Lauria, a girl neither one of them got along with, was parked across the street, so Moomaw decided that she did not want to retrieve her shoes. Crawford volunteered, but when she heard defendant's voice respond to her knock on the door, Crawford returned to Moomaw's car, as they had not expected defendant to be there (4-12-04 130-136).

Moomaw drove to a gas station, to call "Britney" and Edgle to finalize their plans, then drove home and "got ready." Moomaw tried to call defendant, but instead, got a "call back" from "Megan Boutache," "another girl she had a problem with." When defendant called Moomaw to invite her over to his house, she was "all for it," but Crawford was not, because she had a "feeling," but they went anyway and told "Britney" and Edgle that they would call from defendant's house when they were ready to "meet up." (4-12-04 136-139).

Moomaw and Crawford brought liquor with them and arrived to find defendant, Johnson, "Blaine"[3] and "a person that I didn't know"[4] present, and almost immediately, Moomaw allowed Johnson and "the one I didn't know" to borrow her car. "Blaine" talked to Moomaw for "less than a minute" and also left. Moomaw went into the kitchen, took a

[3] It is believed that Crawford was referring to Blaine Braybant.
[4] It is believed that Crawford was referring to Teed.

sip of vodka, drank Cherry Coke® and "messed" with defendant's pit bull puppies. Defendant put the dogs "somewhere" and he and Moomaw went into the living room couch, where they talked. From her vantage point near the kitchen sink, Crawford heard defendant say "say I won't, say I won't do it," and looked over to see "like a side view of a gun" that was pointed in Moomaw's direction, such that if it had gone off, it would not have hit Moomaw. Crawford heard Moomaw say "you're stupid, don't do it, you're gay." Defendant said "yeah, you're right," but started in again with saying "say I won't." As Crawford walked towards the living room, she saw the gun pointed at Moomaw's head and heard defendant say "say I won't," and Moomaw say "no, you wouldn't, don't be stupid." Crawford "glanced" down, heard a gun fire, heard something fall and looked to see defendant stand up and Moomaw motionless on the floor. Crawford initially thought Moomaw had fainted, because she saw nothing indicating that she had been shot. Crawford went to the laundry room, telling herself that it was all a dream and that she would wake up. When she returned to the living room a few seconds later, Crawford saw blood under Moomaw's head and had to kick the dogs to keep them from licking Moomaw's head. Defendant followed Crawford when she returned to the laundry room for a second time, told her "promise you're not going to say anything, swear to God you're not going to tell anybody," and instructed her to say that Moomaw shot herself. Crawford remarked that no one would believe it but agreed to not say anything (4-12-04 140-164).

Defendant told Crawford that they had to leave, she refused at first, but eventually agreed and waited for defendant. When defendant returned, he appeared to be wiping his hands with a towel. Crawford did not see a gun. Crawford asked

defendant if she could use his cellular phone, planning to either call the police or someone to take her to the police, but defendant said that "Blaine" had it. When they got on the front porch, defendant returned to retrieve some marijuana. The pair "hopped two fences" but Crawford eventually split from defendant, and got a ride to a friend's house and called her mother and police (4-12-04 164-174). Defendant was apprehended in Hamtramck at 10:00 a.m. on December 7, 2003 (4-13-04 39-42).

During cross-examination, Crawford acknowledged telling police that this was not the first time Moomaw had told her that defendant pointed a gun at her and that she honestly did not think defendant would hurt Moomaw. She also told jurors that defendant was careless about the gun. Through instant messaging, she told Michelle Gomez that defendant did not do it on purpose and that it sounded like he was joking (4-12-04 183-199).

Police examined and tested a .25 caliber semi-automatic Raven, model MP25 handgun recovered at 88 W. Madge. It appeared to have no major damage other than from general use. It had a manual safety that indicated "safety" when the gun was in a safe mode and also had an internal safety that prevented the gun from firing if a bullet lodged itself halfway into the chamber. The gun did not fire when purposely dropped on the ground or when tapped on the rear slide with a rubber mallet and only fired when the trigger was pulled, and only with six to seven pounds of pressure. During cross-examination, the gun examiner admitted that waiving a gun without the safety engaged was not prudent (4-12-04 217-222, 239).

Police also analyzed one spent cartridge and one bullet recovered from Moomaw's body, determined that the bullet had been fired by the .25 caliber semi-

automatic Raven, but could not determine with 100 percent certainty that the spent cartridge had been fired from the .25 caliber semi-automatic Raven because there were not enough similar microscopic individualistic characteristics between the recovered cartridge and the test-fired cartridge. However, the cartridge was the same type of ammunition recovered (4-12-04 230-236).

Lauria testified that on Friday, December 6, 2003, she traveled to Bad Axe with defendant, "Megan" and "Blaine," spent the night and returned the next day, when she dropped defendant off at home, went to "Megan's" house, then returned to defendant's house at about 8:00 p.m., where she beeped her car horn and defendant came out, but when she learned that Gomez and "Angel Trout" were there, she left and purchased alcohol with "Megan." They returned after Gomez and "Angel Trout" left and consumed three shots of alcohol and smoked some marijuana, while defendant drank a "couple" of beers and smoked some marijuana. Defendant took a weapon into the bedroom and put it under the mattress when he and Lauria went there to kiss. On a couple of occasions in the past, defendant had pulled out his gun, looked at her and said "say I won't," but she did not see the action as threatening, and in fact, she took it as a joke because "he wouldn't do anything like that." (4-12-04 244-253, 255).

Police searching the house found a plastic bag containing a green, leafy substance they suspected was marijuana on a coffee table (4-12-04 58). A spent .25 caliber shell casing was found between the cushions of the couch (4-12-04 59-61). Ten .22 caliber live rounds were found in an "entertainment center." (4-12-04 62-63). A gold box containing 16 .25 caliber live rounds were found in a bedroom closet (4-12-04 65-68). A black gun case was found under the bed (4-12-04 69). Six .22 caliber live

rounds were found in a drawer in the kitchen (4-12-04 71-72). A .22 short shell casing was found in the garbage in the laundry room (4-12-04 73). On the back deck, two large bags of suspected marijuana were found under the lid of the barbeque grill (4-12-04 75). In an area between a chain link fence and a privacy fence, an unloaded Browning .22 long rifle missing its magazine was found (4-12-04 75-79). Later, police found a.25 caliber semi-automatic pistol with a disengaged safety loaded with five live rounds, $110 in cash and a paper towel in the back yard of 89 W. Madge, five houses east and on the same side of the street as defendant's house (4-12-04 80-92, 98).

Nathan Pellow claimed he had a confrontation with defendant on November 2, 2003 when he went to a house in Madison Heights to pick up his sister from a party, where he "kind of" grabbed him by his coat and threatened to "beat the crap out of him," and defendant responded by "screaming" "oh, you want to fuck with me motherfucker," and firing three gunshots – the first one into the air, the second one "came down a little bit," and third one in some unknown direction before "taking off." Despite this, Pellow did not report this incident to police (4-13-04 21-29).

Before closing arguments, defendant asked the trial court to instruct the jury on manslaughter by intentionally aiming a weapon without malice as a lesser-included offense under the authority of *People v Mendoza*:

> Your Honor, I understand that based on the case law that I've provided, People v Mendoza, that I had asked specifically for the lesser offense, manslaughter of intentionally aiming a weapon without malice, that I would still waive under the terms and conditions of – that I would be entitled to that instruction (4-13-04 63-64).

The trial court refused to do so:

> You know the Court has carefully looked at the proposed instruction, which is CJI 2nd 16.11, in light of recent case law. And even under

Gomez, it appears as if the instruction is based upon an element, namely intentionally pointing a firearm, which is not part of the elements necessary for second degree murder. And accordingly, that – I would agree with the Prosecutor. That does appear to be a cognate offense and under the recent opinion of – I always forget the name.

MR. CATALDO: Mendoza.

THE COURT: No, no, no.

MR. WIGOD: Cornel (phonetic).

THE COURT: Cornel. Under Cornel, whether we agree with Cornel or not, that is the law and I am bound to follow it. So, I will not be able to give that instruction (4-13-04 63-64).

Faced with this ruling, the defense was forced to tell jurors in its closing statement:

...And there were some things that I said in opening statement that I had hoped to show. But as I said in opening statement, trials are living, breathing things and circumstances change and there were a couple of things, unfortunately, that I said that I wasn't able to show. But at the same time, I think that you can get a sense of what this case was all about. A sense of the context of this case (4-13-04 83-84).

Faced with the trial court's ruling, the defense could only argue that defendant was careless with the gun, to comport with the involuntary manslaughter instruction the trial court indicated it would give:

...Jamie has said on numerous occasions, as she told you, she doesn't know whether it was on purpose or whether it was intentional. She told her mother she didn't think it was on purpose. She wrote it in her own handwritten statement on that night. She thought it was careless use of a weapon, that in fact Randy had been careless with the weapon. She writes to her friend Michelle Gomez, I know Randy didn't do it on purpose. I don't think he did it on purpose (4-13-04 87).

...

...you know, he needs to be held accountable and there are degrees of accountability. He shouldn't be held accountable as a murderer. He should be held accountable as a manslaughter (sic). That's really what this was. Manslaughter has – You will receive a set of these instructions. I really, really ask that, as the Judge will express to you and how to begin your deliberations and what to do, that you take the time to read the critical elements. Because when I said at the beginning of this case is what I'm going to say now, it's a – issue case. It's not a simple case. It comes to how you define these facts to this – nothing more, nothing less.

> That's why I believe you get it. It's not an issue of sympathy. It's an issue of what those facts me, collectively to you. You may also put in a lesser charge of involuntary manslaughter. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, the Defendant cause (sic) the death of Ashley (sic) Moomaw – Ashley (sic) Moomaw died as a result of a gunshot wound to the head. We don't deny that. The Prosecution's got that – Second, in doing that act, the Defendant acted in a grossly negligent manner. So, the Prosecutor is all over – and all over the instruction of whether it's or, or, or and saying, well, if you don't believe it was intent, then you can believe this. If you don't believe it was this, then it's that. We need to throw this into the mix, okay. The definition of gross negligence. Gross negligence means that more than carelessness (sic). It's mean willfully disregarded the results to others that might follow from an act or failure to act (sic). In order to find that the Defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt. First, that the Defendant knew of a danger to another. That is he knew there was a situation that required him to take ordinary care to avoid injuring another. Second, that the Defendant could have avoided injuring another by using ordinary care. I guess that would be turning that safety on. Third, that the Defendant failed to use ordinary care to prevent injuring another when to reasonable (sic) person it would have been apparent that the result was likely to be serious injury (sic) (4-13-04 91-92).
>
> ...
>
> ...Mr. Smith is responsible for the death of Ashley (sic) Moomaw and I would ask you to – I'm asking you to find him guit (sic) of what the law said his behavior was on that day. And that's guilty of possession of a weapon, which was used, and guilty of a lesser charge (4-13-04 93).

The jury found defendant guilty of the two charged offenses (4-13-04 107-108).

On June 15, 2004, defendant claimed an appeal from his convictions and sentences. Among the five issues of error he argued in the brief he filed in the Court of Appeals on November 23, 2004 was that he was denied a fair trial and a properly instructed jury because the trial court did not instruct on the necessarily included involuntary manslaughter offense. On December 22, 2004, the Court of Appeals (Cooper, P.J., and Fort Hood and Borrello, JJ.) unanimously reversed defendant's convictions on the instructional issue in an unpublished opinion (26h-n), noting that the prosecution had initially charged defendant with violating MCL 750.329 as an additional

lesser offense to murder, but dismissed it before trial, and while the prosecution had broad discretion to choose what charges to bring, the trial court was nonetheless required to instruct the jury regarding the dismissed charge on defendant's request because it was supported by a rational view of the evidence (26k-l).

> The statute [MCL 750.329] provides that a particular act—intentionally aiming a firearm—that results in an unintentional death falls within the general category of involuntary manslaughter. Defendant committed that particular act in this case. Although defendant's state of mind was in dispute, Ms. Moomaw was killed when defendant intentionally aimed a firearm at her head. Had the requested instruction been given, the jury could have determined from the evidence that defenant (sic) intentionally aimed the firearm without intending to harm Ms. Moomaw (26l).

In reaching its result in the case at bar, the Court of Appeals considered and rejected the arguments made by the prosecution:

> On remand, the prosecutor has the authority to charge the defendant with any applicable lesser offense. Yet, that authority to charge defendant does not limit the defendant's right to request, and the trial court's duty to give, an instruction regarding necessarily included lesser offenses supported by a rational view of the evidence. The court must instruct the jury regarding involuntary manslaughter based on a theory of gross negligence should the prosecutor again raise that charge. Consistent with *Mendoza,* however, the trial court must also instruct the jury regarding the more specific, and more appropriate, charge of involuntary manslaughter under MCL 750.329 (26m).
>
> On December 28, 2005, the prosecution filed an *Application for Leave to Appeal.*

Defendant now files this *Brief in Opposition to Application for Leave to Appeal.*

ARGUMENT

1. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY REGARDING THE MORE SPECIFIC AND MORE APPROPRIATE CHARGE OF INVOLUNTARY MANSLAUGHTER UNDER MCL 750.329.

Standard of Review & Issue Preservation

Jury instructions are reviewed de novo to determine whether, taken as a whole, the instructions were sufficient to protect the defendant's rights. *People v Hawthorne,* 265 Mich App 47, 50 (2005). Whether an offense is a necessarily included lesser offense is a question of law reviewed de novo. *People v Mendoza,* 468 Mich 527, 531 (2003).

Defendant preserved this issue for this court's review when he asked the trial court to instruct the jury on involuntary manslaughter under the theory of intentionally aiming a weapon without malice (4-13-04 63-64).

Discussion

A properly instructed jury is an essential element of a defendant's right to a fair trial. US Const, Ams V, XIV; Const 1963, art 1 §17; *Washington v Texas*, 388 US 14, 19, 87 S Ct 1920, 18 L Ed 2d 1019 (1967); *People v Vaughn*, 447 Mich 217 (1994). The trial court must "instruct the jury as to the law applicable to the case." MCL 768.29. If requested, the trial judge must instruct the jury in accordance with the defense theory of the case and any lesser included offenses which are supported by the record. *People v Richardson,* 409 Mich 126 (1980); *People v Beach*, 428 Mich 450 (1988). The failure to honor a request to instruct on a lesser offense denies the defendant the right to have the jury, not the judge or the prosecutor, determine "whether the requisite elements are present." *People v Adams*, 416 Mich 53, 58 (1982).

In the case at bar, the prosecution successfully added a count of involuntary manslaughter under the theory of intentionally aiming a weapon without malice following the preliminary examination, then moved to dismiss it after the case was bound over because it was inconsistent with its theory, not because a rational view of the evidence did not support the charge (26e). Even though the trial court granted the motion, it indicated it would "seriously consider" instructing the jury on the dismissed charge if a rational view of the evidence supported an instruction (3-31-04 4-5). Relying on this representation, defense counsel argued in his opening statement that defendant was guilty of manslaughter under the theory that he intentionally aimed a weapon without malice and without the specific intent to kill (4-13-04 87, 91-92, 93. After the proofs were finished, the trial court refused defendant's instruction on the dismissed charge (4-13-04 63-64).

A. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON INVOLUNTARY MANSLAUGHTER UNDER MCL 750.329 BECAUSE IT WAS A NESSARILY INCLUDED OFFENSE UNDER THE UNIQUE FACTS OF THIS CASE WHERE THE PROSECUTION CHARGED DEFENDANT WITH COMMITTING SECOND DEGREE MURDER USING A GUN.

The Court of Appeals held that there were unique facts in this case that mandated its holding:

> ...the trial court denied defendant's requested instruction regarding involuntary manslaughter under MCL 750.329. *We note that the prosecution initially charged defendant with violating this statutory section, as an additional lesser offense to murder, but dismissed the charge prior to trial.* The prosecution has broad discretion to choose what charges to bring against a defendant. In this case, however, the trial court was required to instruct the jury regarding this dismissed charge upon defendant's request (26k, emphasis added).

Although the prosecution used boilerplate "statutory short form" language in the *General Information,* it is clear from all of the charges in the *General Information* that defendant was charged with committing second degree murder with a gun, as the charge for felony firearm clearly demonstrates:

> **COUNT 4: POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY**
>
> did carry or have in his possession *a firearm, to-wit: a pistol, at the time he committed or attempted to commit a felony, to-wit: Second Degree Murder, MCL 750.317, as more fully set forth in count 1* and/or Manslaughter, MCL 750.321, as more fully set forth in count 2, and/or Manslaughter, MCL 750.329, as more fully set forth in count 3; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan. MCL 750.227b; MSA 28.424(2) (26p, emphasis added).

Before the preliminary examination, the prosecution announced that after it presented its proofs, it was going to move to bind defendant over on an additional, alternative count of manslaughter under the theory of "death by weapon aimed with intent, but without malicious (sic)." (PE 3-4) During the preliminary examination, the prosecution specifically elicited from Crawford that defendant intentionally aimed the gun in Moomaw's direction and successfully moved, following proofs, to add the second alternative count of involuntary manslaughter under MCL 750.329, acknowledging that "it's a question of fact truly as to what the defendant's state of mind is and was at the time of the incident. That's the real question here." (PE 51, 65-67). It then backpedaled and moved to dismiss this charge, not because a rational view of the evidence did not support it, but because it was inconsistent with its "theory of what occurred." (26e).

People v Cornell, 466 Mich 335, 353-354 (2002) held that instructions on lesser offenses are appropriate only "if the charged greater offense requires the jury to find a

disputed factual element that is not part of the lesser included offense and a rational view of the evidence" would support the instruction. In other words, a necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense and does not contain any element not found in the greater offense. *Mendoza,* 540, 541. *Mendoza* determined that both voluntary and involuntary manslaughter were necessarily included lesser offenses of murder because the lesser mens rea required for involuntary manslaughter was included in the greater mens rea for murder. *Id.,* 540-541. *People v Holtschlag,* 471 Mich 1 (2004) addressed involuntary manslaughter as it related to other homicides:

> ...it must be kept in mind that 'the *sole element* distinguishing manslaughter and murder is malice,' [] and that 'involuntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.' If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter. *Id.,* 21-22 (internal citations omitted, emphasis added).

Applying these principles, MCL 750.329 was a necessarily included offense of the charged second degree murder, because of the way the prosecution chose to charge defendant. The prosecution chose to allege that defendant committed second degree murder using a handgun, so involuntary manslaughter under MCL 750.329 did not contain any element not found in second degree murder, making it impossible for defendant to have committed second degree murder using the handgun without first committing involuntary manslaughter under the theory of intentionally pointing a handgun without malice.

These unique facts made this case analogous to the situation posed in *Mendoza* – the sole distinguishing element between second degree murder and manslaughter under MCL 750.329 in this case was malice. That element was the only dispute at trial – defendant acknowledged aiming the gun in Moomaw's direction, shooting the gun and causing Moomaw's death, but argued in his opening statement that he was only guilty of manslaughter under MCL 750.329. The only reason he did not argue the same theory in his closing statement was because the trial court had already denied his request for the instruction.

The Court of Appeals further correctly held that a rational view of the evidence presented in this case supported the instruction. The medical examiner testified that Moomaw died of a gunshot wound and her death resulted from the discharge of a firearm. Crawford testified that immediately before she heard the gun go off, defendant had the gun pointed directly at Moomaw's head, showing an intent to point a firearm at her. The prosecution cannot say now that defendant did not intentionally aim the gun at Moomaw after it successfully added MCL 750.329 as an additional lesser included offense at the preliminary examination. Further, the prosecution's own witnesses admitted that defendant never intended to pull the trigger when he had done similar things in the past. Crawford acknowledged telling police that this was not the first time Moomaw had told her that defendant pointed a gun at her and that she honestly did not think defendant would hurt Moomaw. She also told jurors that defendant was careless about the gun. Through instant messaging, she told Michelle Gomez that defendant did not do it on purpose and that it sounded like he was joking. Lauria testified that on a couple of occasions in the past, defendant had pulled out his gun, looked at her and

said "say I won't," but she did not see the action as threatening, and in fact, she took it as a joke because "he wouldn't do anything like that." Defendant caused Moomaw's death without lawful excuse or justification, because there was no evidence that he acted in self-defense, and, as the prosecution maintained throughout the trial, there were no other circumstances excusing his actions.

The prosecution cannot be heard to complain about a situation that was of its own making. See *Harville v State Plumbing & Heating, Inc,* 218 Mich App 302, 323-324 (1996). This court must deny its application for leave to appeal.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON INVOLUNTARY MANSLAUGHTER UNDER MCL 750.329 BECAUSE IT IS A NECESSARILY INCLUDED OFFENSE OF COMMON LAW MANSLAUGHTER, WHICH ITSELF IS A NECESSARILY INCLUDED OFFENSE OF MURDER.

The portion of the Court of Appeals opinion holding that manslaughter under MCL 750.329 is a necessarily included lesser offense was not error. It cited *Mendoza* for the proposition that "manslaughter, both voluntary and involuntary, is a necessarily included, rather than cognate, lesser offense of murder."

> The Court found that the lesser mens rea required for involuntary manslaughter is included in the greater mens rea of murder. Pursuant to *Mendoza,* '[w]hen a defendant is charged with murder, and instruction for voluntary and involuntary manslaughter *must* be given if supported by a rational view of the evidence (26l, emphasis in original).

The Court of Appeals, citing *Holtschlag,* 6-7, which quoted Perkins & Boyce, Criminal Law (3d Ed) p. 105, recognized that involuntary manslaughter under MCL 750.321 was "a catch-all concept including all manslaughter not characterized as voluntary," and includes "every unintentional killing, committed without malice and without justification of excuse." (26l) It went on to hold that MCL 750.329 "falls within the general category of

involuntary manslaughter," implying that it was a necessarily included lesser offense of common law involuntary manslaughter (26l). In *People v Heflin,* 434 Mich 482, 504 (1990), this Court implied that involuntary manslaughter under MCL 750.329 was a necessarily included offense of common law manslaughter:

> In our opinion, in promulgating the involuntary manslaughter statute, the Legislature intended to punish the intentional pointing of a firearm which results in death even though the defendant did not act with the criminal intent sufficient for conviction under common-law involuntary manslaughter. *People v Maghzal,* 170 Mich App 340, 345; 427 NW2d 552 (1988); *People v Duggan,* 115 Mich App 269, 272; 320 NW2d 241 (1982).

Heflin cited with approval *Maghzal,* a case that also addressed the purpose of involuntary manslaughter under MCL 750.329. In *Maghzal,* the defendant killed her husband when she jokingly pointed and fired a gun at him. The defendant claimed she took the clip out and thought the gun was empty. At a bench trial, the trial court considered second degree murder, but refused a defense request to consider common law involuntary manslaughter and involuntary manslaughter under MCL 750.329. The Court of Appeals reversed, holding "[the] defense theory was accidental shooting, defense counsel argued the two lesser offenses in closing argument. We rule that the factfinder must address those theories argued by defendant and which were supported by the facts." *Heflin,* 505, citing *Maghzal,* 347.

The above cases demonstrate that only difference between common law involuntary manslaughter and involuntary manslaughter under MCL 750.329 is the degree of culpability, or the difference in the mens rea. This is identical to the analysis used in *Mendoza* to distinguish involuntary manslaughter from murder. Therefore, it must be concluded that involuntary manslaughter under MCL 750.329 is a necessarily included lesser offense of murder because it is a necessarily included lesser offense of

involuntary manslaughter, which is itself a necessarily included lesser offense of murder. The only difference between the three offenses is the degree of mens rea required: careless use for involuntary manslaughter under MCL 750.329, gross negligence for involuntary manslaughter and wanton and willful disregard of the danger for murder. It is impossible to commit second degree murder using a gun without first committing involuntary manslaughter under MCL 750.329.

As is argued above, the Court of Appeals was also correct when it found that a rational view of the evidence supported defendant's requested instruction:

> The statute provides that a particular act—intentionally aiming a firearm—that results in an unintentional death falls within the general category of involuntary manslaughter. Defendant committed that particular act in this case. Although defendant's state of mind was in dispute, Ms. Moomaw was killed when defendant intentionally aimed a firearm at her head (26l).

The medical examiner testified that Moomaw died of a gunshot wound and her death resulted from the discharge of a firearm. Crawford testified that immediately before she heard the gun go off, defendant had the gun pointed directly at Moomaw's head, showing an intent to point a firearm at her. The prosecution cannot say now that defendant did not intentionally aim the gun at Moomaw after it introduced evidence of other gun incidents involving defendant to show his "intent" and that the incident was not an accident. Further, the prosecution's own witnesses admitted that defendant never intended to pull the trigger when he had done similar things in the past. Crawford acknowledged telling police that this was not the first time Moomaw had told her that defendant pointed a gun at her and that she honestly did not think defendant would hurt Moomaw. She also told jurors that defendant was careless about the gun. Through instant messaging, she told Michelle Gomez that defendant did not do it on purpose and

that it sounded like he was joking. Lauria testified that on a couple of occasions in the past, defendant had pulled out his gun, looked at her and said "say I won't," but she did not see the action as threatening, and in fact, she took it as a joke because "he wouldn't do anything like that." Defendant caused Moomaw's death without lawful excuse or justification, because there was no evidence that he acted in self-defense, and, as the prosecution maintained throughout the trial, there were no other circumstances excusing his actions.

C. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON INVOLUNTARY MANSLAUGHTER UNDER MCL 750.329 BECAUSE IT WAS CONSISTENT WITH THE DEFENSE THEORY THAT HE WAS GUILTY OF ONLY THIS OFFENSE.

The due process clause of US Const, Am XIV requires the trial court to instruct the jury on every essential element of a charged offense. *Berrier v Egeler,* 583 F2d 515 (CA 6, 1978), cert den 439 US 955; 99 S Ct 354; 58 L Ed 2d 347 (1978). As stated by *People v Reed,* 393 Mich 342, 349-350 (1975):

> The instruction to the jury must include all elements of the crime charged, *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967); *People v Pepper,* 389 Mich 317, 322; 206 NW2d 439 (1973), and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them. 22 Michigan Law and Practice, Trial, §236, p 386.

The defense theory was that defendant was guilty of manslaughter under the theory of intentionally aiming a gun without malice, a theory explicitly argued in its opening statement:

> ...Let me be real clear about one thing. Randy Smith is guilty. He's guilty of having that weapon in his hand. He's guilty of having that weapon fire from his hand and the result of that was that Ashley (sic) Moomaw died. I am not going to stand here and try and say to you not guilty, let's forget all those facts. That would be – on may part because the facts show that he

killed her (sic). *I'm only asking that you look at the law and you look at what the law has given you as options. And that the option you select is one that fits the facts, not the highest possible charge. You will be getting an instruction from the law that is manslaughter, intentionally aiming a weapon without malice and without the specific intent to kill. That you will see and we will argue more in closing argument and you'll see from the facts how that charge plays into what prosecution has to prove on second degree and first degree. – second degree and manslaughter* (sic). But you see, there is one critical difference. And in second degree, as the prosecution has read you, for him to prove his case beyond a reasonable doubt, tht he has to show the Defendant had one of these three stages of mind: he intended to kill, he intended to do great bodily harm, or he knowingly created a very high risk of death or great bodily harm knowing that the death or great bodily harm would be the likely result of his actions. Involuntary manslaughter charge is a little bit different. It has all the same elements as we talked about the two. At the end of the trial, you will be able to have a set so you can read them because listening to us talk about them is very different before all the evidence you're going to be hearing on all the information, but the key difference here is that the Defendant intended to point the firearm – in the manslaughter charge – without lawful excuse or justification. The charge itself reads without malice. Malice being desire to inflict injury or harm or suffering on another because of hostile – deep seated meanness.

There is on denial (sic) that the death occurred – gun was in his hand and he fired. *And that's the single point difference between the prosecution is going to interpret those facts and how I'll be interpreting those facts and presenting proof* – (someone coughing) *Randy Smith* (4-12-04 17-18, emphasis added).

...

...When we finish the trial, when we come back after closing statements, I'm going to ask you now, as I'm going to ask you then, find him not guilty of second degree murder – guilty of intentionally aiming that weapon without that malice, the guilt make him for that but do it for the correct charge (4-12-04 22-23).

Where a defense is central to the defendant's case, as involuntary manslaughter under the theory that defendant intentionally aimed the gun at Moomaw without malice, and there is some evidence to support it, a failure to properly instruct on that defense is reversible error. *People v Stanley Jones*, 69 Mich App 459, 461 (1976).

D. FAILURE TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER UNDER MCL 750.329 WAS NOT HARMLESS ERROR.

Contrary to what the prosecution claims, the Court of Appeals did engage in a harmless error analysis:

> Had the requested instruction been given, the jury could have determined from the evidence that defendant (sic) intentionally aimed the firearm without intending to harm Ms. Moomaw.

In this case, defendant admitted causing the fatality, but disputed the intent element. To prevent defendant from getting a jury instruction on manslaughter under MCL 750.329 where a rational jury could find that only the lesser offense was committed prevents him from submitting his defense theory to the jury and getting a verdict consistent with the defense admission of a lesser degree of culpability. US Const, Ams V, XIV; *Hopper v Evans,* 456 US 605; 102 S Ct 2049; 72 L Ed 2d 367 (1982); *Beck v Alabama*, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980); *Bennett v Scroggy*, 793 F2d 772 (CA 6, 1986); *Ferrazza v Mintzes*, 735 F2d 967 (CA 6, 1984). It has been recognized that a jury is unlikely to acquit a defendant who admits a lesser degree of criminal behavior where no option is given to the jury to convict consistent with the defense admission. See *People v Silver*, 466 Mich 386, 393, fn. 7 (2002).

Further, the error was not harmless merely because the jury rejected the claim of involuntary manslaughter under MCL 750.321. Even though this court held that failure to give a requested lesser included offense instruction is harmless error when the jury was instructed to consider other lesser offenses and still returned a guilty verdict on the principal charge in *People v Beach,* 429 Mich 450 (1988) that holding was qualified:

> The existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the *Ross*

> *[People v Ross*, 73 Mich App 588 (1977)] analysis. For it to apply, the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Beach, supra*, 490-491.

The jury's verdict of guilt of second degree murder rather than involuntary manslaughter under MCL 750.321 does not mean that it would have necessarily rejected involuntary manslaughter under MCL 750.329. If the jury believed that defendant intentionally aimed the gun in Moomaw's direction but accidentally fired it, the instructions that were given gave them choice of acquitting defendant, pursuant to the instruction on accident, or convicting him of an inapposite charge. The jury was entitled to consider the full spectrum of criminal responsibility and may have convicted defendant of involuntary manslaughter on the theory of intentionally aiming a weapon without malice if they believed the theory of accident but did want to "let him off" completely.

SUMMARY AND RELIEF

Defendant-Appellee RANDY R. SMITH respectfully requests that this Honorable Court deny the prosecution's *Application for Leave to Appeal* and remand his case to the trial court for a new trial.

ROBIN M. LERG (P 40297)
Attorney for Defendant-Appellee
3001 W. Big Beaver, Ste. 324
Troy, MI 48084
(248) 649-4777

Date: January 13, 2006